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IN THE

Supreme Court of the United States

October Term, A. D. 1932.

No. [redacted] 2

JOHN FACTOR,
Petitioner,

vs.

H. C. W. LAUBENHEIMER, United States Marshal, and GODFREY HAGGARD, His Britannic Majesty's Consul General,
Respondents.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

THE STATEMENT OF THE CASE BY THE DEMANDING GOVERNMENT IS IRRELEVANT AND MISLEADING.

Counsel for the Demanding Government devotes a large part of his brief to an inaccurate statement of facts. This statement consists of a highly colored narrative of counsel's opinions, prejudices and desires as distinguished from the facts disclosed by the record. These matters have no relevancy to petitioner's application for certiorari which is based solely upon the two legal propositions therein stated.

Petitioner has insisted throughout this entire proceeding that he is innocent of any crime whatsoever, and that the record fails to disclose any competent evidence sufficient to sustain a finding of probable cause. Petitioner submits, however, that the legal questions involved are decisive and make irrelevant any inquiry into the evidence.

Counsel for the Demanding Government virtually admits that his alleged statement of facts is unwarranted but seeks

to excuse it by indulging in various subterfuges. This long drawn out discussion of alleged facts is not only surplusage tending to confuse the issues, but contains positive misstatements of the record which can only have been made in an attempt to prejudice this Court against the petitioner.

Every statement of counsel that the record discloses evidence of larceny, larceny by bailee, or embezzlement is wholly untrue.

Petitioner and the Demanding Government agree that the law is well settled that the findings of the United States Commissioner on the sufficiency or insufficiency of the evidence are conclusive and cannot be reviewed. The Commissioner said in his findings (Rec. 19):

> "The complaint here charges that the respondent in London, England, received certain sums from a corporation known as the Broad Street Press Limited, knowing the same to have been fraudulently obtained. There is no charge in the complaint of embezzlement or larceny or receiving money, valuable security or other property knowing the same to have been embezzled or stolen. Counsel for the demanding government has contended that there is some evidence tending to prove larceny as bailee or larceny by trick. This is not charged in the complaint, and I now say that I am unable to discover in the record sufficient competent evidence to sustain such finding."

Counsel for the Demanding Government also admitted that his government did not possess any evidence of any of these crimes when he said before Commissioner Walker on October 28, 1931:

> "Mr. Overmeyer: Believe it or not, when this warrant was first issued, and when attack was made that we were by devious means trying to bring the case within the treaty, I asked them why, or rather inquired why additional warrants weren't taken out

which I thought were justified, such as larceny, embezzlement and participating in these crimes and that sort of thing, and they said that after a full consideration their judgment of the thing was that the only crime to charge him with was receiving money knowing the same to have been fraudulently obtained."

The numerous misstatements and the vituperative attacks upon the petitioner and various judges are not only wholly unwarranted but can only be explained as an effort to distract the court's attention from the issues presented by the petition for certiorari which are purely legal in their nature.

II.

SINCE THE EXTRADITION COMPLAINT FAILS TO CHARGE AN ACT WHICH IS CRIMINAL IN ILLINOIS, THE COMMISSIONER WAS AT ALL TIMES WITHOUT JURISDICTION.

(a) Complaint must charge an act which is criminal in the state of Illinois.

It is not the contention of petitioner that an extradition complaint must "follow the form of a local indictment" (Respondent's Brief, p. 11) or set forth the crime charged with the particularity that such an indictment would require.

The position of petitioner is that the offense *charged in the extradition complaint* must be a crime under the laws in force in the state where the accused is found, in this case, Illinois. The complaint against petitioner does not meet this requirement.

It is upon the charge contained in the complaint that the jurisdiction of the extradition commissioner is based. *The*

evidence introduced on the hearing can go only to sustain the charge in the complaint; it can never be used to enlarge the charge. This court has held upon every occasion when the question has arisen that in order to extradite from the United States to Great Britain the *acts charged in the complaint* must constitute a crime not only in Great Britain but also in the state where the accused is found. *United States* v. *Rauscher,* 119 U. S. 407, 420, 421; *Wright* v. *Henkel,* 190 U. S. 40, 57, 61; *Pettit* v. *Walshe,* 194 U. S. 205, 217; *Collins* v. *Loisel,* 259 U. S. 309, 311; *Benson* v. *McMahon,* 127 U. S. 457, 462, 463. This rule is made a part of the British Extradition Act of 1870 (Sec. 10 of said Act, Chitty, Statutes, Sixth Ed.), and has been consistently followed in the English cases. *In re John Anderson,* 11 Upper Canadian Common Pleas Reports, 2; *In re Windsor,* 6 Best & Smith's Reports, 522; *In re Latimer,* 10 Canadian Criminal Cases 244.

(b) The Demanding Government's contention that "The Broad Street Press and its agents acquired property in ways designated in England as 'fraudulently obtained,' and recognized in Illinois as forms of larceny and embezzlement, in consequence of which Factor was guilty under the Illinois statute of receiving stolen property," cannot be sustained.

The only act charged in the extradition complaint against petitioner is that he "received from Broad Street Press, Limited" various sums "knowing the same to have been fraudulently obtained." (Rec. 12.) The Illinois receiving statute is limited to the receiving of "stolen goods, or anything the stealing of which is declared to be larceny or property obtained by robbery or burglary." (Cahill's Illinois

Revised Statutes, 1931, ch. 38, par. 507.) It has been repeatedly held by the Illinois Supreme Court that obtaining property by false pretenses or by fraud is not stealing and is not larceny. *People* v. *Barnard*, 327 Ill. 305, 308; *Murphy* v. *People*, 104 Ill. 528, 533.

The Demanding Government in its brief, pages 30 to 32, argues that the alleged fraudulent conduct by which The Broad Street Press obtained the money charged to have been received by Factor is the same as or equivalent to larceny and embezzlement in England. On the basis of this argument the Demanding Government seeks to make applicable the Illinois Receiving Statute. The argument fails for several reasons.

While the term "fraudulently obtained" has been used in the extradition proceeding as a general description of the supposed offense by which The Broad Street Press obtained the money charged to have been received by Factor, the actual charge in England is that The Broad Street Press obtained such money "by conspiracy to defraud."

The offense of obtaining money "by conspiracy to defraud" is neither equivalent nor similar to larceny or embezzlement either under the laws of England or under the laws of Illinois. The offense charged against the petitioner in England is "receiving money knowing the same to have been obtained under circumstances amounting to a misdemeanor, to wit, conspiracy to defraud," contrary to Section 33 (1) of the British Larceny Act of 1916. (Rec. 141.) Conspiracy to defraud is made a misdemeanor by Subsection 7 of Section 2 of the Offenses Against Property Act. (Halsbury Laws of Eng., Vol. 9, p. 708.)

Section 33 (1) of the British Larceny Act reads:

> "Every person who shall receive any property knowing the same to have been stolen or obtained in any

way whatsoever under circumstances which amount to felony or misdemeanor shall be guilty of an offense of the like degree (whether felony or misdemeanor) and on conviction thereof liable * * *."

The expression "fraudulently obtained" has never been defined in England or elsewhere as "larceny," "embezzlement," or "larceny by bailee." "Fraudulently obtained" in the instant case can only mean that form of fraud which is charged in the complaint in England, to wit, "conspiracy to defraud." (Rec. 141.) To receive money in England known to have been obtained by fraud is there made criminal. It is not made criminal in Illinois. No misleading statement as to the definition or meaning of the word "fraud" in England to include larceny, embezzlement, or larceny by bailee, can change this fatal defect in the application for extradition. "Fraudulently obtained" does not mean obtained by larceny, embezzlement, or larceny by bailee under any criminal statute in England or in the State of Illinois.

A New York statute punishes by express language the same offense as is charged in the complaint in England against petitioner. This explains the *Klein case*, although we think a discussion of that case is improperly injected by the Demanding Government.

Even if "fraudulently obtaining" under the English statute were the same as or equivalent to larceny or embezzlement under the Illinois law, the finding of the Commissioner that there is no evidence of larceny or embezzlement is conclusive and would leave the Demanding Government's argument on this point without factual basis. (See this Reply Brief, pp. 2, 3.)

(c) The Illinois Fraudulent Conveyance Act does not make criminal the act charged in the complaint.

The brief of the Demanding Government (p. 19) states that the Commissioner found that one could be committed in Illinois under the Illinois Fraudulent Conveyance Act for receiving property knowing the same to have been fraudulently obtained and that "the Commissioner's judgment is final on that point."

Aside from the erroneous statement of law as to the finality of the Commissioner's judgment in this regard, it is enlightening to note that the Commissioner avoided passing on the applicability of the Fraudulent Conveyance Act. He held himself bound by the case of *Kelly* v. *Griffin*, 241 U. S. 6, while at the same time expressing a doubt as to the soundness of the statement in that case. After reviewing the *Kelly case* at length the Commissioner stated (Rec. 26):

> "It has been most earnestly contended by the respondent that this case does not correctly state the law of Illinois and that the Illinois statute referred to, does not properly bring the acts therein made an offense, within the purview of the treaty. * * * *It may well be said that whether or no the acts made an offense in said statute come within the purview of the treaty, is a question of great nicety and closeness. It may be well regarded as one which ought to have further judicial interpretation by the courts of ultimate review.*" (Italics ours.)

Prior to 1925 there had existed in England simultaneously for nearly one hundred years the criminal *receiving* statute under which petitioner is sought to be charged (Stat. 7 and 8 of George IV, later reenacted as Sec. 33 of the Larceny Act 1916) and a penal fraudulent conveyance act substantially identical with the Illinois Fraudulent Conveyance Act. (13 Eliz., c. 5). In fact, the Illinois Fraudu-

lent Conveyance Act was taken from the English statute and its scope must therefore be considered to be identical with that of the English act. (*Ewing* v. *Runkle,* 20 Ill. 449.)

The simultaneous existence of these two statutes in England over this long period clearly establishes that they were not intended to cover the same offense.

The English Penal Fraudulent Conveyance Act was repealed in 1925. (Sec. 172, Law of Property Act of 1925.)

This repeal shows that the English Parliament intended that the offenses covered by the Penal Fraudulent Conveyance Act could no longer be criminally punishable in England. It follows that an offense covered by the corresponding Illinois Act is not one for which the petitioner could be extradited to Great Britain.

The fraud intended by the transfer is the critical element under the Fraudulent Conveyance Act, and this fraudulent intent cannot be implied from the transfer itself. *Behrens* v. *Steidley,* 198 Ill. 303, 306.

(d) The Federal Receiving Statute, relied on by the Demanding Government, does not apply to this case.

Counsel still persists in his effort to justify the complaint by federal statutes having application only to territory outside the jurisdiction of the several states. Sections 467 and 451, Title 18, U. S. C. A. This argument is in direct conflict with the holding of this Court in *Pettit* v. *Walshe,* 194 U. S. 205, 217, and was discarded for that reason by the Circuit Court of Appeals. (Rec. 1170.)

(e) The case of Kelly v. Griffin, 241 U. S. 6, is not authority for the proposition that receiving money knowing the same to have been fraudulently obtained is a crime in Illinois.

The analysis of the case of *Kelly* v. *Griffin*, 241 U. S. 6, by counsel for the Demanding Government is that Kelly or Thomas Kelly & Sons, of which firm he was a partner, obtained money directly from the government by fraud and not through public officials. (Respondent's Brief, 21, 29.) If this were true, Kelly would be a principal, guilty of obtaining property by stealing, embezzlement, or false pretenses and not a receiver guilty under any receiving statute. A partner receiving from his own partnership is, of course, receiving from himself and is not a receiver as that term is used in any criminal receiving statute.

This was the very point Mr. Justice Holmes had in mind when he stated (p. 15):

> "There ~~may~~ be a doubt whether the appellant, if a party to the fraud, received the money of the government directly from it, or through a third hand, so as to be guilty under this count of the complaint."

Justice Holmes concluded that the complaint sufficiently charged the receiving of government money from public officials and continued:

> "We are not prepared to pronounce his detention upon the count unjustifiable, in view of the finding. * * * We do not think it necessary to require a modification of the complaint * * *."

If counsel were correct in his position that Kelly was charged only with receiving money directly from the government, the decision in the *Kelly case* would, of course, be wrong as there could then be no receiving offense. Kelly was charged with receiving money from public officials

knowing that they had unlawfully obtained it from the government. This was the ground of the decision by Mr. Justice Holmes. (Kelly Rec. 18.) Judge Carpenter and Judge Evans recognized this distinction from the case at bar.

Counsel suggests that there was no Canadian statute cited to the Court pertaining to receiving government money fraudulently obtained by government officials. Sections 359, 347 and 399 of the Canadian Criminal Code were cited to both the Commissioner and to this Court by counsel for the Demanding Government. (Kelly Rec. 224, Government's Brief 54.) Section 359 made it an indictable offense for a government employee to steal (defined in Sec. 347 of the Canadian Criminal Code to include fraudulent taking) government money, and Section 399 thereof made it an offense to receive property "obtained by any offense punishable on indictment." There was no Canadian Fraudulent Conveyance Act cited either to the Commissioner or to this Court.

The language of the charge itself in the *Kelly case*, the statement of the issues by Mr. Justice Holmes, and his subsequent discussion as to whether or not the evidence established that the money was received directly from the government or from a third party all correlate with the statutes cited to this Court relating to receiving money unlawfully obtained by government officials and show that this Court's decision is not authority in the present case for the proposition that it is criminal in Illinois to receive money from a private corporation with knowledge that it has been fraudulently obtained by it from private individuals.

III.

THE MOTION TO DISMISS THE APPEAL BECAUSE OF THE ADOPTION OF THE DAWES-SIMON TREATY SHOULD HAVE BEEN SUSTAINED.

Counsel's reply to our contention that this Court should review the ruling of the Circuit Court of Appeals that the Dawes-Simon Treaty did not terminate the proceedings against petitioner can be briefly dealt with.

Counsel's first contention apparently is that the Circuit Court of Appeals was incompetent to decide the question whether the Dawes-Simon Treaty is in force, because it is not a judicial question. Having taken this position, it was improvident for counsel to cite as authority in this branch of his argument the cases of *Armstrong* v. *Bidwell*, 124 Fed. 690 and *Shepard* v. *N. W. Life Ins. Co.*, 40 Fed. 341, in each of which the Court undertook to determine whether or not at a given time a treaty was in effect.

The statement made by counsel for the Demanding Government that the respective governments have agreed that the Dawes-Simon Treaty is not in force is not correct. (See Roger's letter, Exhibit 6. Rec. 1282.)

No doubt the parties to a treaty have the right to prescribe what steps shall be taken before the treaty becomes operative. But the legal effect of the actions taken by the contracting parties is a matter for judicial determination. With all the acts of the governments concerned before it, the Circuit Court of Appeals passed over the question whether the Dawes-Simon Treaty was in force, and undertook to dispose of the case upon the theory that it made no difference to petitioner's rights whether the treaty presently in effect was the Dawes-Simon Treaty or the pre-existing treaty.

In our original brief herein we contended that the case could not properly be so disposed of because the Dawes-Simon Treaty not merely abrogated the treaty under which the warrant for petitioner's detention was issued, but removed the offense with which he was charged from the list of extraditable offenses.

Counsel for respondents asserts on the contrary that the provision in the new extradition treaty covering receiving money knowing it to have been stolen "or unlawfully obtained" includes the offense charged against petitioner of "receiving money knowing it to have been fraudulently obtained." In our former argument we pointed out that the rule of *ejusdem generis* requires the word "unlawfully" to be limited to such unlawful acts as belong to the same category as stealing. This is apparently conceded by counsel but he asserts that "stealing" embraces not only burglary and embezzlement but swindling and false pretenses, citing 59 C. J. 1223.

The text of this citation does not support counsel's claim for it, so far as the offense of swindling is concerned, nor do the authorities cited support the text in its statement that false pretenses are included in the concept "stealing." The only case cited which deals in any way with the subject of false pretenses is *Commonwealth* v. *Kelley*, 180 Mass. 320, from which it appears that it is specifically provided by statute in Massachusetts that the term "larceny" shall include a taking by false pretenses. Obviously no such statute would have been passed except to break down an existing distinction between larceny or stealing and a taking by false pretenses, and we submit that its existence merely reinforces the contention made in our original argument that the two offenses do not normally belong in the same category.

It follows that the Dawes-Simon Treaty does not include the offense with which petitioner was charged, and that if it was in force, the proceeding against the petitioner was abated. Section 29, Title 1, U. S. C. A., referred to by counsel, which provides that the repeal of a statute shall not "release or extinguish any penalty, forfeiture, or liability incurred under such statute" has no application, since a treaty is not a statute, nor does the abatement of the extradition proceeding involve the release or extinguishment of any penalty, forfeiture or liability incurred by petitioner.

We therefore insist for the reasons stated in our original brief that the Court of Appeals erred in refusing to decide whether or not the Dawes-Simon Treaty is in effect, and that this Court should grant certiorari to correct that error.

CONCLUSION.

To correct a misstatement by counsel for respondents we deny that petitioner has abandoned his position that the Demanding Government has misused the extradition treaty in making of it an instrument for the collection of alleged private debts. The matter is not urged here for the reason that petitioner has yielded to the holding of the Circuit Court of Appeals that this question is one which is political and not judicial in its nature.

An examination of the statutes of Illinois is conclusive that the offense charged against petitioner is not made criminal in that state. Illinois punishes the receiving of property with knowledge of its wrongful source only when the original taking involves the element of asportation.

The Commissioner, Judge Fitzhenry and the majority of the Circuit Court of Appeals have carefully avoided

holding that the charge made against petitioner stated a criminal offense in Illinois. Each of the decisions adverse to petitioner has been predicated on the assumption that the *Kelly case* prevented the inferior tribunals from expressing their independent conclusion on this point. Witness the language of Judge Fitzhenry appearing at the bottom of page 46 of the brief filed by the Demanding Government:

> "So the court feels that the question raised by the motion to strike this petition for writ of habeas corpus has heretofore been passed upon by the Supreme Court of the United States, and it is not for this court to presume to reverse the Supreme Court of the United States. If that holding is to be changed, it is to be changed by the Supreme Court of the United States itself * * *."

No reason is stated by the Demanding Government in its brief why certiorari should be denied here, except that its allowance might result in its failure to obtain an extradition. Manifestly under the state of the law in Illinois extradition in this case would be unwarranted and this petition should be granted.

Respectfully submitted,

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